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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]/88

SAYLES FINISHING PLANTS, INC., *Appellant*,

v.

MARTIN J. TOOMEY, Tax Assessor of the Town of East Providence

Appeal from the Superior Court of the State of Rhode Island

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion and dissenting opinion in the Supreme Court of Rhode Island (Appendix A, *infra*, pp. A1-A14) are reported at 188 A. 2d 91.

JURISDICTION

(i) This was an action for relief from alleged over-assessment of taxes, brought in the Superior Court of the State of Rhode Island pursuant to Rhode Island General Laws 1956, §44-5-26 (*infra*, pp. A18-A19).

(ii) The decision of the Supreme Court of Rhode Island was entered on February 13, 1963. Under the Rhode Island

practice, neither a judgment nor a formal remittitur is entered in the Supreme Court. The final judgment of the Superior Court of Rhode Island, rendered in compliance with the decision of the Supreme Court (Appendix B, *infra*, p. A15), was entered on April 9, 1963. The notice of appeal was filed in the Superior Court on April 9, 1963.

(iii) The jurisdiction of this Court to review the judgment below by appeal is conferred by 28 U.S.C. §1257(2).

(iv) The cases relied on to establish the substantiality of the questions presented by this appeal are *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, and *Central of Georgia Ry.* v. *Wright*, 207 U.S. 127. The cases relied on to establish that the remedy is by appeal are *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, and *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61, note 3.

(v) The State statutes which, in their application to appellant in the circumstances of this case, are asserted to violate the Due Process Clause of the XIV Amendment, are R. I. General Laws 1956, §§44-5-15 and 44-5-16. They are set out in full in Appendix C, *infra*, pp. A16-A17.

QUESTIONS PRESENTED

1. The statutes of a State provided that the assessors of each municipality should make a list "containing the true, full, and fair cash value of all the ratable estate in the town, placing land, buildings and other improvements, tangible personal property, and intangible personal property, in separate columns, and distinguishing those who give in an account from those who do not." The statutes also provided, with exceptions not material here, that the prerequisite for judicial relief in respect of overassessment of property by municipal tax authorities shall be the filing of an account, and that no judicial relief should be available if the taxpayer has fraudulently concealed or omitted any property from his account.

Taxpayer filed an account, on a form provided by the municipality, listing and valuing four kinds of personal property (machinery, stock in trade, fixtures, and vehicles), and listing and valuing, by plat and lot, all of its real estate. Following the assessment, which it deemed excessive, taxpayer filed the statutory petition for judicial review, and at the trial announced that it was contesting only the assessment of certain parcels of real estate. The trial judge found as a fact that the taxpayer's realty had been overassessed by over $1,173,000, but denied all relief because of an intervening decision by the highest court of the State, rendered during the pendency of the trial, which held that the filing of an account containing a merely summarized listing of personal property barred all relief in respect of an asserted overassessment of real property, even where the personal property assessment was not questioned. The trial judge's action was then sustained by the State's highest court in the present case, on the authority of its earlier decision.

The first question presented is whether, by reason of this intervening decision, which was without precedent, and which was not foreshadowed by any expressions in the case law of the State, the statute has been construed and applied so that the taxpayer has been retroactively deprived of the right to any judicial hearing on its claim of overassessment of its real property, in violation of the Due Process Clause of the Fourteenth Amendment.

2. The highest State court had earlier held that "water power and water rights are not independently taxable." In the present case, the trial judge held taxpayer's account further deficient, and hence that taxpayer was additionally not entitled to any judicial relief, because of failure to include in the account any mention of certain flowage rights that were appurtenant to the real estate which was duly listed, even though such rights had been noted on the tax rolls for years, and even though such rights had not been separately assessed.

The second question presented is whether, having regard to the prior State law, the statute has in still another respect been construed and applied so that the taxpayer has been retroactively deprived of the right to any judicial hearing on its claim of overassessment of its real property, in violation of the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Due Process Clause of the Fourteenth Amendment is sufficiently familiar as not to require quotation.

2. The Rhode Island statutes that, in their application to appellant in the circumstances of this case, are asserted to violate the Due Process Clause of the Fourteenth Amendment, and the other statutes incorporated in those provisions by specific statutory reference or otherwise necessarily involved, appear in Appendix C, *infra*, pp. A16-A22.

STATEMENT

Brief exposition of Rhode Island's statutory scheme for local taxation is an indispensable preliminary to a factual summary of the present case.

A. LOCAL TAXATION IN RHODE ISLAND.

In Rhode Island, the date of assessment of town valuations is noon on December 31 of each year (R. I. Gen. Laws 1956, §44-5-1).[1] Before assessing any valuations, the assessors must cause notices of their meeting to be published, which notices "shall require every person and body corporate liable to taxation to bring in to the assessors at such

[1] The Rhode Island General Laws are the compilations; earlier versions of General Laws were published in 1938, 1923, 1909, and 1896. The next earlier compilation was the Rhode Island Public Statutes of 1882.

The Rhode Island Public Laws are the annual session laws.

time as they may prescribe a true and exact account of all the ratable estate owned or possessed by him or it, describing and specifying the value of every parcel of such real and personal estate * * *" (§44-5-15, *infra*, p. A16). If the taxpayer filed "a written notice of his or its intention to bring in an account," then such account may be filed between April 1 and 15 following the date of assessment (*ibid.*). Such account, made under oath before a notary or other qualified officer, may be sent to the assessors by registered or certified mail (*ibid.*). Failure to file a notice of intention amounts to a waiver of the right to file an account (*ibid.*).

The account is required by §44-5-16 (*infra*, p. A17) to be made under oath, and the same section goes on to provide that "whoever neglects or refuses to bring in such account, if overtaxed, shall have no remedy therefor, except as provided in §§ 44-4-14, 44-4-15, 44-5-26 to 44-5-31, inclusive, and 44-9-19 to 44-9-24, inclusive." The remedies set forth in the middle group of citations refer to the procedure by way of petition in Superior Court for relief from assessment, which is described below; the other provisions are not relevant here.[2]

Even when a taxpayer brings in an account. "The assessors shall nevertheless assess each person's ratable estate at what they deem its full and fair cash value" (§44-5-17; *infra*, p. A17); and another section (§44-5-20; *infra*, pp. A17-A18) goes on to provide that—

> "The assessors shall make a list containing the true, full and fair cash value of all the ratable estate in the town, placing land, buildings and other improvements, tangible personal property, and intangible personal

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[2] Section 44-4-14 concerns the taxation of property in decedent's estates, § 44-4-15 the taxation of property of minors not under guardianship.

Sections 44-9-19 to 44-9-24 prescribe the procedure to effectuate redemption from tax sales.

property, in separate columns, and distinguishing those who give in an account from those who do not, and shall apportion the tax accordingly."

Thereafter the tax levy is applied to the assessment roll, and the resultant tax roll is certified by the assessors to the town treasurer, not later than June 15 (§44-5-22). The tax due may be paid in quarterly instalments (§§ 44-5-7, 44-5-8).

"Any person aggrieved on any ground whatever by any assessment of taxes against him in any city or town" may within three months after the last day for the payment of the first instalment "file a petition in the superior court * * * for relief from such assessment," to which the then assessors are made parties respondent. §44-5-26, *infra*, p. A18. This section goes on to state that in case the taxpayer has not filed an account, he shall not have the benefit of the remedy by way of petition, with two exceptions, not relevant here.[3]

The remedy by way of petition is exclusive, subject possibly to a suit in equity (§44-5-27, *infra*, p. A19), but the filing of the petition does not stay any proceedings for collection (§44-5-28). Procedure follows that in actions at law (§44-5-29).[4]

If the taxpayer has filed an account, and if on the trial "it shall appear that the taxpayer's real estate, tangible personal property or intangible personal property has been assessed at a value in excess of its full and fair cash value, even though it may be found that such full and fair cash value is in excess of the value placed on such property by

[3] One exception is if real estate has been assessed for more than the assessment for the same real estate in the next preceding taxable year, another is if the tax is illegal (as distinguished from overly high). The procedure governing these two exceptions is set forth in § 44-5-31.

[4] Rhode Island still continues the basic separation between law and equity.

the taxpayer in his account," then the court is to give judgment that the excess, plus his costs, be deducted from his tax. §44-5-30, *infra*, p. A19. "If, however, on the trial of said petition it shall appear that the taxpayer has fraudulently concealed or omitted any property from his account," or if the assessors have neither overassessed him nor illegally taxed him, then the assessors "shall have judgment and execution for their costs" (*ibid.*).

B. THE PRESENT PROCEEDING.

The appellee Toomey, Tax Assessor of the then Town of East Providence[5] (hereinafter usually "Assessor"), gave notice to all persons, partnerships, and corporations liable to taxation therein to bring in and file a true and exact account of the ratable estate owned or possessed by him or it in said Town as of noon, December 31, 1956 (Tr. 8-9; Ex. 1).[6]

Appellant (hereinafter usually "Taxpayer"), by letter dated January 4, 1957, filed with Assessor a notice of its intention to file an account (Tr. 9-10; Ex. 2), and such an account was in fact timely filed on or about April 12, 1957, duly verified by Taxpayer's treasurer (Tr. 10-14, 171, 2675-2676, 2682; Ex. 3).

The account itself, which, as the trial justice specifically found, was submitted on a form provided by the Town, included all ratable property, real and personal, owned or possessed by Taxpayer in the Town of East Providence as of December 31, 1956, with a statement of the estimated value thereof (Ex. 3).

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[5] Presently, and since December 1, 1958, the City of East Providence, pursuant to R. I. Pub. Laws 1957, c. 33, and R. I. Pub. Laws 1958, c. 8.

[6] "Tr." refers to the transcript of testimony, which is paged consecutively. Exhibits introduced by the appellant, petitioner below, are numbered; those introduced by the appellee Assessor, respondent below, are lettered.

On this account, Taxpayer's tangible personal property was set forth and valued under four headings: Machinery and tools; stock in trade; store, shop and office fixtures; vehicles. Taxpayer's real estate was listed by plat and lot, covering 22 separate parcels; each parcel of land was separately valued, and, whenever improvements were located on any parcel, such improvements were similarly separately valued. (Ex. 3.)

Taxpayer's account, in respect of personal property, followed the scheme of breakdown of personal property on the form without further particularization. In respect of real estate, although each lot was separately valued, there was no mention of the water rights appurtenant to one lot abutting Omega Pond, a matter set forth in more detail below.

Thereafter, Assessor made his assessment (Tr. 20-21; Ex. 5), which, in respect of the parcels of real estate later contested, valued the land at the amount returned in Taxpayer's account, but assessed the improvements thereon at $1,614,355 in lieu of Taxpayer's valuation of $775,800.

Taxpayer then paid, under protest, the four quarterly instalments of the tax (Tr. 202-204; Ex. 19-22), in full (Tr. 3873). Within three months of the payment of the first instalment on October 11, 1957 (Ex. 19), Taxpayer on January 2, 1958, timely filed the statutory petition for relief in the Superior Court for Providence County. Assessor answered with a general denial, and the case came on for a trial that extended over 57 trial days and resulted in a transcript comprising 4251 pages.

At the outset of the trial, Taxpayer announced that it was contesting only so much of the assessment as covered the real property that was subsequently sold to Almac's, Inc., plus the assessment on Plat 17 Lot 15 (Tr. 14, 47-49, 162-163), as to which there was an admitted overassessment of $3,000 by reason of a mechanical error in Assessor's office (Tr. 16-18, 41, 48, 59-60, 163). Taxpayer specifically waived

its right to contest the assessment on its tangible personal property and on the remainder of its real property (Tr. 157-159). A table showing Taxpayer's valuations in its returns and the assessment as made is contained in Ex. 4, while Ex. 17 lists the contested parcels (other than the one admittedly overassessed by error). As the trial developed, however, the only valuation in issue became that of Plat 35 Lots 73 and 74, on which Taxpayer's Glenlyon Print Works had been located at the time of the assessment.

With respect to the water rights, the record shows that Omega Pond was originally a cove (Tr. 4228), and that title to the land under the pond had never been conveyed either to Taxpayer or to any other party (Tr. 4220-4226). Several years after the assessment in controversy, and after the plant involved had been liquidated, Taxpayer sold its water rights; at that time there was included in the conveyance (Ex. DD) a grant of whatever rights the vendor had in Omega Pond, but there was no covenant of warranty with respect to those rights (Tr. 4229-4231).

The Town's tax rolls for 1922 and 1933 contained entries as follows (Tr. 4052):

> "3840 sq. ft. of land north side of Phillipsdale Pond on Plat entitled 'Plat of land in East Providence owned in part by Frank A. Sayles & Agawam Finishing Company' together with the dam across said Phillipsdale Pond & the gates, flumes and other appurtenances, *rights & easements* connected therewith." [Italics added.]

This piece of land with rights appurtenant thereto was assessed in 1922 for $15,000, and in 1927 for $19,200 (Tr. 4053-4054).

In 1934 or 1935, the Town's tax rolls were revised to describe all real estate by plat and lot numbers, and to establish a system under which a separate card was prepared for every plat and lot number appearing on the tax rolls. Each card contained a detailed description of the

land, the improvements thereon, and, in some cases, a description of appurtenant rights. On the card covering Plat 17 Lot 40 was the same description, quoted above, which had been on the tax rolls since 1922. (Tr. 4058, 4061-4066.)

On the tax roll for the taxes assessed as of December 31, 1956, the assessment here in issue, the entry for Plat 17 Lot 40 read (Tr. 4071-4072):

> "Triangular piece of land north side of Phillipsdale Pond on Plat entitled 'Plat of land in East Providence owned in part by Frank A. Sayles and Agawam Finishing Company' together with the dam across said Phillipsdale Pond and the gates, flumes and other appurtenances, *rights and easements* connected therewith." [Italics added.]

The account filed by Taxpayer with respect to the taxes assessed as of December 31, 1956, listed four lots on Plat 17, including Lots 14, 15, and 40 described as "Land along Omega Pond" (Ex. 3). Taxpayer valued Plat 17 Lot 40 at $50 (Ex. 3), as did Assessor for the year in question (Tr. 4072; Ex. 4).[7] Assessor did not separately value any water rights belonging to Taxpayer (Ex. 5). Assessor's valuation of Plat 17 Lot 40 with its appurtenances was accordingly not contested by Taxpayer (Tr. 346, 3790; Ex. 17).

C. THE RULINGS BELOW.

The trial concluded on March 24, 1960, but the trial judge (Mrs. Justice Murray) did not file her decision until February 9, 1962. Meanwhile, on December 5, 1961, the Supreme Court of Rhode Island decided *Ewing* v. *Tax Assessors of the Town of Jamestown,* R.I. , 176 A. 2d 69, which is set out in full in Appendix D (*infra*, pp. A23-A27).

In the *Ewing* case, the taxpayer had filed an account that described and valued the several parcels of her real estate as well as the value of the buildings and improvements

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[7] The documents showing the descriptions and assessments from which Mr. Viall, City Clerk, testified, were attached to the record as Ex. 86 for id. and 87 for id. (Tr. 4074). They show that the $50 assessment dated from 1953.

thereon. With respect to intangible personal property, the account merely said "Not taxable," while it listed tangible personal property as "Household furniture in excess of $300.00 Value $5,775." At the trial, had before a jury, the taxpayer challenged only the assessment on her real estate, and, at its conclusion, obtained a verdict in her favor.

Even though the assessment as to personalty had not been in issue, the Rhode Island court held that the taxpayer's description of her personal property did not constitute a reasonable compliance with the statute (p. A25, *infra*): "Such generality is no aid to the assessors in making a proper return." Similarly, the court held the return inadequate as to intangible property, and concluded that, because of these deficiencies, the Superior Court had no jurisdiction to consider the taxpayer's contention that she had been overassessed in respect of her real estate.

In the instant case, decided in Superior Court after the rendition of the Rhode Island Supreme Court's *Ewing* opinion, the trial justice pointed out that the dispute related only to the value of the buildings and improvements on Lots 73 and 74 of Plat 35. She found as a fact that, although the real estate in question had been assessed at a valuation of $1,719,935.00 by Assessor, its full and fair cash value was only $546,717.50. None the less, in view of the *Ewing* decision, the trial justice concluded that Taxpayer's account, which classified its personalty under the four descriptive headings on the Town's form, and which did not mention the water rights appurtenant to Plat 17 Lot 40, "is not such an account as is required by the statute and therefore cannot be the basis for recovery in case of overassessment." She therefore concluded that "The Superior Court is without jurisdiction to grant relief in the instant case since this petitioner has not complied with *Section 44-5-15 and 16*. Therefore the relief sought under Section 44-5-26 is denied."

Taxpayer prosecuted a bill of exceptions to the Supreme Court challenging this ruling; Assessor neither filed nor

prosecuted any bill of exceptions to challenge the trial justice's finding of fact in respect of his overassessment of the buildings and improvements on the lots in question.

The Supreme Court of Rhode Island, specifically rejecting Taxpayer's contention that to follow the *Ewing* case would involve a denial of due process of law in violation of the Fourteenth Amendment, in that such an application of the statutes would deny it the right to a hearing, held that Taxpayer's account was insufficient because it classified rather than inventoried its personalty, even though Assessor's valuation of the personalty had not been challenged (Appendix A, *infra*, pp. A1-A11). The Supreme Court did not pass upon the Superior Court's ruling that omission to list the water rights, which were noted on the tax records and were not separately assessed, was likewise fatal. Roberts, J., dissented, on the ground that the statute, which was remedial in nature, should have been construed in favor of Taxpayer (*infra*, pp. A11-A14).

The Supreme Court of Rhode Island accordingly overruled Taxpayer's exception, and remitted the case to the Superior Court for entry of judgment on the decision. The Superior Court entered judgment accordingly, whereupon Taxpayer filed there its notice of appeal to this Court.

HOW THE FEDERAL QUESTIONS WERE RAISED

1. No Federal right was asserted in the Superior Court, nor was any Federal question mentioned in Taxpayer's bill of exceptions. In its brief in the Rhode Island Supreme Court, Taxpayer argued at some length that the decision of the trial court deprived it of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Rhode Island specifically passed on this claim of Federal right, saying (*infra*, p. A8):

> "The petitioner further contends that the decision of the trial justice constitutes prejudicial error for the

reason that the interpretation which she placed on §§ 44-5-15 and 44-5-16 results in a denial of due process and thus is violative of the fourteenth amendment to the United States constitution. In support thereof it cites a number of federal decisions to the effect that due process requires that before a tax shall become irrevocably fixed a taxpayer must be apprised of its right to a hearing which must be real and not merely apparent.

"We are in full accord with the principles decided in the cases cited, but on their facts they are clearly distinguishable from the circumstances of the instant case."

3. Accordingly, this Court has jurisdiction on appeal; see *Charleston Assn.* v. *Alderson*, 324 U.S. 182, 185-186:

"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

4. Here the statute as written apparently provides a remedy, certainly for a taxpayer who has filed a return, which is destroyed only by the decision. That is to say, this is a case where the statute on its face bears no apparent Federal impediment but where only the application thereof is invalid on Federal grounds. Accordingly, under the doctrine of *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, the remedy is by appeal pursuant to 28 U.S.C. §1257(2). *Accord, Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61, note 3.

5. Under the Rhode Island practice, the final judgment in the cause is entered in the Superior Court. Consequently the appeal is taken from that tribunal rather than from the Supreme Court of the State. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58; *Greenough* v. *Tax Assessors*, 331

U.S. 486; *Joslin Co.* v. *Providence,* 262 U.S. 668; cf. *Testa* v. *Katt,* 330 U.S. 386, 388, note 3 (writ of certiorari similarly runs to the Superior Court of Rhode Island).

THE QUESTIONS ARE SUBSTANTIAL

The gravamen of Taxpayer's contentions here is that, because of an unexpected construction of the applicable taxing statutes, one that in the face of the statutory development and every expression in the case law could not possibly have been anticipated by any individual knowledgeable in the field, the Supreme Court of Rhode Island has deprived Taxpayer of any meaningful hearing on the validity of the assessment made on its plant, and has denied it any relief whatever in respect of an overassessment that, after a prolonged trial, was found as a fact to be excessive to the extent of well over one million dollars—$1,173,217.50, to be exact. The case is thus squarely within the principle of *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, although, since the application of a statute is involved, review is by appeal under the doctrine of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282.

First. We do not question for a moment the authority of the Supreme Court of Rhode Island to declare the meaning of a Rhode Island statute. If that tribunal had, as an original proposition, declared that the provisions now in question required as a condition precedent to review of a tax assessment on real estate an inventory of a taxpayer's personal property in such detail as would be appropriate in a fiduciary's accounting or in a schedule of losses to be submitted to an insurer, then no Federal question would have been open to one who had filed an account.

But the Rhode Island statutes here involved were not construed as an original proposition; they had a long and significant history of development, legislative as well as judicial.

1. Over a period of nearly 40 years, every Rhode Island decision dealing with deficiencies in taxpayers' accounts

had been followed by remedial legislation relaxing the requirements for such accounts. Thus, the case of *Clarke* v. *Tinkham*, 20 R.I. 790, 38 Atl. 926, decided in 1893, which held insufficient a return reading simply "goods, chattels, wares and merchandise 3384 dollars," arose under a statute which provided that if on trial "it shall appear that such person has concealed or omitted any property from his account, or has not placed a fair value thereon," judgment should go for the assessors. R.I. Pub. Stat. 1882, c. 43, §15, as amended by R.I. Pub. Laws 1892, c. 1064. A few years later, in the revision of 1896, this provision was amended by inserting the word "wilfully," so that it read, "If on trial * * * it shall appear that such person has wilfully concealed or omitted any property from his account," etc. R.I. Gen. Laws 1896, c. 46, §17.

Next, it was still held that the clause, "or has not placed a fair value thereon," barred relief for a taxpayer even in case of an overassessment, if the jury found that he had not set a fair value on the property in his account. *Union Realty Co.* v. *Kiernan*, 9 R.I. Dec. 226, decided in 1933 with reference to a 1931 account.[8] This was followed by a further amendment that substituted "fraudulently" for "wilfully"; eliminated the "fair value" clause; and moreover affirmatively provided for relief "even though it may be found that such full and fair cash value is in excess of the value placed on such property by the taxpayer in his account." (R.I. Pub. Laws 1932, c. 1945, §5.) That is the present law. §44-5-30, *infra*, p. A19.

2. In 1926, the Rhode Island Supreme Court held that, where a taxpayer was seriously ill and died within the period fixed for making returns and was accordingly unable to make a return, there was no "neglect" within the statutory provision that provided "whoever neglects or

[8] The "Rhode Island Decisions," a printed series, published rescripts of decisions rendered in the Superior Court; they follow an earlier mimeographed series cited as "Rhode Island Rescripts."

refuses to bring in such account, if overtaxed, shall have no remedy therefor." *Bishop* v. *Tax Assessors, Newport,* 47 R. I. 351, 133 Atl. 342 (1926), construing R. I. Gen. Laws 1923, c. 60, §7. This amelioration was thereafter codified in statutory form (R. I. Pub. Laws 1932, c. 1945, §2; R. I. Pub. Laws 1935, c. 2260, §2), and is still in the statute today. §44-5-16, *infra,* p. A17.

3. As has been seen (*supra,* pp. 5-6), §44-5-20 requires the assessors to list real estate, tangible personalty, and intangible personalty in separate columns. These separate columns reflect the differences in assessing real and personal property.[9]

Moreover, the 1932 amendments affirmatively provided for relief in respect of the three kinds of property in the disjunctive. Whereas for many years the statute simply provided the conditions under which the assessors should have judgment and execution for costs,[10] in 1932 the General Assembly provided that if on the trial "it shall appear that the taxpayer's real estate, tangible personal property, or" —we stress the disjunctive, *or*— "personal property has

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[9] As Mr. Justice Barrows, later a member of the Supreme Court of Rhode Island, said in *Castner, Curran & Bullitt, Inc.* v. *Burnham, et al., Assessors of Taxes,* 7 R. I. Rescripts 1675, 1676 (1924), a case involving the valuation of large travelling cranes:

> "Assuming that we are correct in finding these cranes to be personal property for purposes of taxation, the City can not over-value real estate and when that valuation is questioned pursuant to the statute, retort that the over-valuation is fair because there has been an equal under-valuation of personal property. Such argument confuses the well settled differentiation required in assessing taxes upon real estate and personal property."

[10] From 1896 to 1932, the provision read: "If on trial of said petition, either with or without a jury, it shall appear that such person has wilfully concealed or omitted any property from his account, or has not placed a fair value thereon, the assessors shall have judgment and execution for their costs." R. I. Gen. Laws 1896, c. 46, § 17; *id.* 1909, c. 58, § 17; *id.* 1923, c. 60 § 17.

been assessed at a value in excess of its full and fair cash value," then the taxpayer is to have judgment. R. I. Pub. Laws 1932, c. 1945, §5; carried into R. I. Gen. Laws 1938, c. 31, §16, and into the present compilation, *id.* 1956, §44-5-30, *infra,* pp. A19-A20.

4. No case, prior to *Ewing* v. *Tax Assessors of the Town of Jamestown* (Appendix D, *infra,* pp. A23-A27), decided in December 1961, even remotely suggested that a deficiency in a return in respect of personalty barred the remedy in respect of realty, much less where the assessment in respect of the deficiently returned class of property was not questioned. On any basis—the successive relaxations in the statute, the decided cases, the practice as reflected in the rescripts of the trial court—on any basis or indeed on any combination of bases, not only was the *Ewing* return sufficient, but, *a fortiori,* it was not law in Rhode Island that a deficiency in an account in respect of personalty barred relief as to an established overassessment of realty.

The foregoing assertion is further supported by the course of the present litigation. As has been shown, Assessor filed a mere general denial. If his counsel had entertained the slightest hope that the contest could be summarily disposed of on jurisdictional grounds, then, under Rhode Island practice, he should—and undoubtedly would—have filed a motion to dismiss, as indeed the respondents did in the *Ewing* case (*infra,* pp. A23, A26). For, as the trial judge said on the 51st day of trial here (Tr. 3773), "My feeling is, • • • if the Town had a real conviction in that direction, that it should have been raised at the outset on the pleadings." Instead, Assessor and his counsel submitted to the drudgery and expense of a trial that extended from September 21, 1959, until March 24, 1960, a period of over 6 months that included no less than 57 trial days devoted to establishing the value of Taxpayer's plant. Consequently, as the trial justice also said, near the close of the present trial (Tr. 3793), "Well, if the proceeding is worth anything it is for the benefit of the tax-

payer to bring before the court what aspect of the tax burden they believe to be unfair, and I believe it is divisible, and I believe the history of the statute will bear me out." The amendment effected by R. I. Pub. Laws 1932, c. 1945, §5, discussed *supra*, pp. 16-17, plainly bears out the trial justice's conclusion of divisibility.

Second. Since, therefore, the *Ewing* ruling came down while the present case was under advisement in the trial court, there was no way in which Taxpayer could revise his account; that document had been irrevocably filed more than four and a half years earlier. The instant case, therefore, like *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, presents a situation where, by a retroactive decision, a timely remedy was rendered unavailable by the state court through the retroactive creation of a new remedy for which the taxpayer was out of time. Thus, as here, the taxpayer was deprived of any meaningful hearing. What Mr. Justice Brandeis said for a unanimous Court in the *Brinkerhoff-Faris* case, 281 U.S. at 681-682, is therefore fully applicable here:

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the State courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare *Postal Teleg. Cable Co.* v. *Newport*, 247 U.S. 464, 475-6."

The standard imposed by the opinion below requires a breakdown of property in the account which will "be of assistance to the assessor in assessing a tax against each such parcel" of personal property (*infra*, p. A10). This requirement is so nebulous, so ill-defined, and so subjective as to each assessor that it sets a standard, compliance with which is impossible to achieve with any certainty whatever. Thus the statute has been transformed from one universally thought to confer on the taxpayer a real and substantial remedy for overassessment to one which, as now applied retroactively to Taxpayer, confers only a sham or apparent right to a hearing. Such a statute as thus applied is violative not only of the principles laid down in the *Brinkerhoff-Faris* case, *supra*, but also of those enunciated in *Central of Georgia Ry.* v. *Wright*, 207 U.S. 127.

Third. Under Rhode Island's statutory scheme, the only hearing afforded a taxpayer on the quantum of his assessment is the trial of his petition in Superior Court.

The suggestion of the Rhode Island court (Appendix A, *infra*, p. A9), that "Here the legislature has provided that respondent [Assessor] was required to hold hearings at a time or times subsequent to the effective day of assessment; that petitioner [Taxpayer] should receive notice in advance as to the time and place of such hearings," and that these provisions somehow satisfied the Fourteenth Amendment's requirement of Due Process of Law in the primary sense of an opportunity to be heard, does not survive examination of the statute.

Prior to 1949, it might have been argued that the statutes contemplated a hearing before the assessors. Each taxpayer was then required "to bring in to the assessors a true and exact account of all his ratable estate." R. I. Gen. Laws 1896, c. 46, §6; *id.* 1909, c. 58, §6; *id.* 1923, c. 60, §6; cf. *id.* 1938, c. 31, §6 (*infra*, p. A20). This account was further required to be sworn to "before some one of the assessors" by §7 of each of the cited compilations. And

the assessors were required to indicate, by public notice, when and where they would be assembled to receive taxpayers' accounts. R. I. Pub. Laws 1915, c. 1211, §2; R. I. Gen. Laws 1923, c. 60, §6; *id.* 1938, c. 31, §6 (*infra*, p. A20).

But any contention that these provisions looked to a hearing disappeared in 1949, when the statute was completely recast, and a new procedure established. R. I. Pub. Laws 1949, c. 2330, §7. Thenceforward the account might be sworn to "before some notary public or other person authorized to administer oaths in the place where such oath is administered," and there was also introduced the present plan whereby the taxpayer gives notice of his intention to file an account, with a provision for subsequent mailing of the account by registered mail (*ibid.*, §5), later amended to include mailing by certified mail (R. I. Pub. Laws 1956, c. 3717, §1); and the law now specifically provides that "Such account shall be deemed to be brought in to the assessors if the same shall be sent to them by registered or certified mail, postage prepaid, postmarked before twelve o'clock midnight of the last day on which accounts may be brought in pursuant to the provisions hereof; * * *." The provision for public notices of assessors' meetings is no longer in the law. Compare R. I. Gen. Laws 1956, §44-5-15 (*infra*, pp. A16-A17), the present statute, with the corresponding provisions of the next previous revision, R. I. Gen. Laws 1938, c. 31, §6 (*infra*, pp. A20-A22).

Now, very plainly, inasmuch as the law permits taxpayers to mail their accounts to the assessors right up to midnight of the last day, no hearing before the assessors is even theoretically contemplated, as indeed none had been contemplated in practice for many years.[11] Significantly

[11] "It must be conceded that the statement is only prima facie evidence of the account in which the tax-payer is liable to be assessed. The assessors need pay no attention whatever to it." Barrows, J., in *M., R. & G. Frank, Inc.* v. *Burnham, et al.*, 6 R. I. Rescripts 1369, 1370 (1923).

enough, the quoted sentence that permits midnight mailing is wholly omitted from the text of §44-5-15 as it is set forth in the opinion below (*infra*, p. A3). But that section as it appears in the statute book (*infra*, pp. A16-A17) makes it clear beyond possible argument that the only meaningful hearing under the Rhode Island statutes today is the hearing in the Superior Court—and in the present case Taxpayer was denied his right to be heard there because of the requirement, retroactively and unexpectedly introduced into the statute by the decision now sought to be reviewed, that the account which is the prerequisite to such hearing in respect of grossly overassessed real estate must be, not a generalized classification, but an itemized inventory of personalty.

Fourth. A similar retroactive denial of a hearing appears in respect of Taxpayer's failure to list the water rights appurtenant to Plat 17 Lot 40.

The Rhode Island court had earlier held, and there are no decisions to the contrary, that water rights are not independently taxable. See *Slatersville Finishing Co.* v. *Greene*, 40 R. I. 410, 418, 101 Atl. 226, 229:

> "In considering this phase of the case we may start with the principle generally conceded that water power and water rights are not independently taxable. Power is a force and water is an element no more taxable than air. The respondent assessors did not assume to tax the mill privilege and water power independently but as a part of the land. For the purpose of taxation the right to use the water of a stream and the water power that arises from controlling the flow of its current must be considered as appurtenant to and an incident of some land."

Moreover, as has been seen (*supra*, pp. 9-10), the tax records of East Providence for many years had plainly disclosed that there were water rights appurtenant to Plat 17 Lot 40; that the assessment thereon had been $15,000 in 1922, $19,200 in 1927, but was reduced to $50 in 1953 and thereafter; that Taxpayer in its 1956 account and

Assessor in his 1956 assessment had concurred in placing a $50 valuation on that lot with its easements; and that Assessor did not undertake to value those water rights separately.

To contend, therefore, that Taxpayer's account in respect of Plat 17 Lot 40 did not contain "such sufficiency in the separation and description of the various parcels of real and personal property as to be of assistance to the assessor in assessing a tax against each such parcel" (Appendix A, *infra*, p. A10) would be sheerest nonsense; and to hold that the listing made was such as to deprive Taxpayer of all relief in respect of the overassessed real estate involves a retroactive construction of the statute into a form that runs afoul of *Central of Georgia Ry.* v. *Wright*, 207 U.S. 127. There a unanimous Court said (pp. 141-142):

> "As we have seen, the system provided • • • by the statutes of the State as construed by its highest court required of the taxpayer that he return all his property, whether its liability is fairly contestable or not, upon pain of an *ex parte* valuation, against which there is no relief in the tax proceedings or in the courts, except in those cases where fraud or corruption can be shown in the action of the assessing officer.
>
> "Reluctant as we are to interfere with the enforcement of the tax laws of a state, we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the Fourteenth Amendment to protect against impairment by state action."

In the present case, at the very least, the separate taxability of the water rights was assuredly "fairly contestable" in view of the unmodified holding in *Slatersville Finishing Co.* v. *Greene*, 40 R. I. 410, *supra*. Consequently to hold that failure to include the water rights specifically in its account bars Taxpayer from any hearing in respect of an overassessment of its property involves a denial of

due process of law within this Court's *Central of Georgia* decision.

We recognize, of course, that while the Superior Court rested its decision in part on Taxpayer's failure to list its water rights separately, the Supreme Court after reciting that circumstance (Appendix A, *infra*, pp. A4, A5) approved the judgment of dismissal primarily in reliance on Taxpayer's treatment of its personalty (*infra*, p. A8). But inasmuch as the water rights omission is in the case, was ruled on by the Superior Court, and could later be seized upon as an additional ground for denying relief in the event of reversal on the personalty issue and remand pursuant thereto, we think the water rights point is properly raised for disposition now, cf. *Brotherhood of Clerks* v. *Allen*, No. 316, this Term, decided May 13, 1963, lest Taxpayer be required to take a second appeal to this Court.

Fifth. We cannot forbear to add that the retroactive construction of the tax statutes applied against Taxpayer here is uncomfortably reminiscent of the disclosures in recent voting rights cases of the means employed to deny registration to qualified citizens. Here, as in *United States* v. *Penton*, 212 F. Supp. 193, 198 (M.D. Ala.), Taxpayer's account has been used "as a tricky examination or test." Here, as in *United States* v. *State of Alabama*, 192 F. Supp. 677, 679, 680 (M.D. Ala.), affirmed, 304 F. 2d 583, 587 (C.A. 5), affirmed, 371 U.S. 37, the account has been rejected for errors that are slight and technical. Cf. also *United States* v. *McElveen*, 180 F. Supp. 10, Fdg. 12 at 12-13 (E.D. La.).

But whereas in the cases cited there was discriminatory treatment, resulting in a denial of equal protection to a particular class of prospective voters, here the statute has been construed and applied so as to deny due process to all taxpayers, because all are equally deprived of a hearing by the Rhode Island court's rigid but subjectively vague requirements for the account (here retroactively

applied), where on the face of the statute such account is required to be filed as the indispensable prerequisite to a meaningful hearing on the quantum of any challenged assessment.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of the present appeal.

Respectfully submitted.

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JUNE 1963.

APPENDIX A

OPINION BELOW

SUPREME COURT

Ex.&c. No. 10,412

SAYLES FINISHING PLANTS, INC.

v.

MARTIN J. TOOMEY, Tax Assessor of the Town of East Providence.

OPINION

POWERS, J. This is a petition for relief from an alleged overassessment of the petitioner's real estate by the assessor of taxes of the then town of East Providence, for the tax assessed on December 31, 1956. It was brought under the provision of G. L. 1956, § 44-5-26, and is based on the petitioner's allegation that it has duly filed an account of its ratable estate with the assessor in compliance with the requirements of §§ 44-5-15 and 44-5-16. The case was heard before a justice of the superior court, without the intervention of a jury, and resulted in a decision denying the petition for lack of jurisdiction. It is before us on the petitioner's bill of exceptions, but it is prosecuting only its exception to the decision.

The record discloses that respondent, acting in his capacity as tax assessor, did, in December 1956, give notice to every person, copartnership and corporation liable to taxation in East Providence to bring in and file with him as tax assessor a true and exact account of the ratable estate owned or possessed by him or it in the town as of December 31, 1956, at 12:00 noon. The notice was given pursuant to the provisions of § 44-5-15.

The petitioner, a Rhode Island corporation, acting in accordance therewith, gave notice by letter dated January

4, 1957 of its intention to file with respondent between April 1 and 15, 1957, a true and exact account of its ratable property.

Thereafter, on April 12, 1957, petitioner filed with respondent a sworn account which purported to be a full, true and exact account of all of its ratable property located in East Providence. Such account specifically set forth the real estate owned by it, identifying each parcel by plat and lot, stating improvements, if any, and ascribing to each parcel the value thereof. The total value placed by petitioner on its land was $154,420, with $844,995 for buildings and improvements. The respondent, however, assessed said land and improvements at substantially more than the value attributed thereto by petitioner, although the assessment of December 31, 1956 was the same as for December 31, 1955 and several years prior thereto.

In addition to setting forth its real estate as aforesaid, the account purported to include its ratable personalty by identifying the same as follows:

"Machinery propelled by power in factory, machine shop, manufacturing establishment, etc.	[$]537,500.
• • •	
"Stock in trade,	182,500.
"Store, shop and office fixtures,	12,500.
• • •	
"Vehicles,	3,000."

The petitioner paid the assessed tax under protest and within the time allowed by law duly filed its petition for relief from an alleged overassessment of its ratable real property, in accordance with § 44-5-26. This section specifically provides that the relief afforded thereby shall be available only to a taxpayer who has made an account of his ratable property as provided in §§ 44-5-15 and 44-5-16, the pertinent provisions of which are as follows:

§ 44-5-15: "Before assessing any valuations, the assessors shall cause printed notices of the time and place of their meeting to be posted in three (3) public places in the town, for three (3) weeks next preceding the time of such meeting, and shall advertise in some newspaper published in the town, if any there be, at least once a week for the same space of time. Such notices shall require every person and body corporate liable to taxation to bring in to the assessors at such time as they may prescribe a true and exact account of all the ratable estate owned or possessed by him or it, describing and specifying the value of every parcel of such real and personal estate, together with such additional information as may be prescribed by the assessors relative to such ratable estate as may be contained in any corporation or inheritance tax return filed with the state by such person within the year preceding the date of assessment next prior to the bringing in of such account; provided, however, that if any person or body corporate liable to taxation shall file with the assessors, on or before the expiration date prescribed by the assessors as aforesaid, a written notice of his or its intention to bring in an account, such person or body corporate may bring in to the assessors such account at any time between April 1st and April 15th next following the date of assessment."

§ 44-5-16: "Every person bringing in any such account shall make oath before some notary public or other person authorized to administer oaths in the place where such oath is administered that the account by him exhibited contains, to the best of his knowledge and belief, a true and full account and valuation of all the ratable estate owned or possessed by him; and whoever neglects or refuses to bring in such account, if overtaxed, shall have no remedy therefor, except * * *."

At the trial of the case, petitioner did not offer to contest the assessment on its personal property nor on all of its

real estate. It contested only the assessment on the portion of its real estate which, subsequent to the date of assessment, namely, October 14, 1958, had been sold to Almac's Inc. for $350,000.

The trial consumed some fifty-seven days, during which more than 4,000 pages of testimony were compiled, numerous exhibits received and the premises viewed by the trial justice. Experts testifying on behalf of petitioner gave extensive evidence of comparable sales. Robert B. Dresser, a trustee of the Frank A. Sayles trust, which in turn owns all of the stock of petitioner, testified that about 1953 steps were taken with a view to selling the property in question as a going concern. He further testified that despite exhaustive efforts which extended over several years, no such purchaser could be found. There then followed the sale of the property to Almac's Inc. as aforesaid.

An examination of the conveyance from petitioner to Almac's discloses that the latter purchased the property subject to petitioner's excepting therefrom its rights to take water from and to flow Omega Pond, so called.

Elliot Broadbent, president of petitioner corporation, testified that for years prior to the sale of the property to Almac's, petitioner had been deriving some $10,000 annually from the sale of such water to Washburn Wire Company, Bird & Son, Inc., and Kennecott Wire & Cable Company. He further testified that some time after the sale to Almac's, petitioner sold its water rights but was not asked and did not specify the consideration involved.

There is in the record a deed from petitioner to Washburn Wire Company dated February 10, 1960 which specifically conveys the water rights in question. Although the federal stamps indicate that the purchase price was in excess of $250,000, it is not possible to determine the consideration paid for such rights since the conveyance also includes several other parcels of realty.

The property in issue was assessed by respondent in the sum of $1,719,935. On the basis of the actual sale to Almac's in October 1958, comparable sales, opinions furnished by experts and her view of the premises, the trial justice found the fair market value of the property in question to have been $546,717.50 on December 31, 1956.

She further found as a matter of law, however, that although petitioner's property had been overassessed by something more than one million dollars, petitioner was not entitled to the relief it sought for the reason that the court was without jurisdiction to grant it.

Relying on *Coventry Co.* v. *Assessors of Taxes*, 16 R. I. 240, *Clarke* v. *Tinkham*, 20 R. I. 790, and *Ewing* v. *Tax Assessors*, R. I. , 176 A.2d 69, the trial justice held that petitioner's description of its personal property was too general, so as not to constitute "a true and exact account of all the ratable estate owned or possessed by him or it" as required by §§ 44-5-15 and 44-5-16. She further held that the account was also defective in that it failed to include petitioner's "right to flow," which she found to be ratable property within the definition of that term as laid down in *Coventry Co.* v. *Assessors of Taxes, supra.*

The petitioner first contends that the trial justice erred in holding the account to be defective for failure to specify its rights to the water in Omega Pond as a separate parcel of ratable property. It argues that such rights were appurtenant to the land fully set forth and described in the account. Moreover, it urges that if the water rights in question should have been separately designated and valued, the omission was not fraudulent as presently required by § 44-5-30.

In this regard petitioner relates the history of § 44-5-30, showing that when the *Coventry Co.* case was decided the statute simply provided for judgment against the taxpayer if at the trial it should appear that any ratable property

had been omitted from the account without regard to whether such omission was intentional or otherwise. The petitioner further showed that the section was later amended to provide for the "willful" concealment or omission, and still later that the concealment or omission must be fraudulent. It argues that there is no evidence whatsoever of any fraudulent intention to omit a description and valuation of water rights from its account.

The petitioner misconceives the import of § 44-5-30. In our judgment the legislature intended thereby to deny relief to a taxpayer who, having brought in an account which on its face purports to be a true, full and exact description of every parcel of real and personal property as required by §§ 44-5-15 and 44-5-16, has omitted some item of ratable property with the deliberate intention of fraudulently concealing the taxpayer's interest therein.

The petitioner argues, and we think with justification, that the legislature did not intend to penalize a taxpayer who by inadvertence, oversight or mistake neglected to include ratable property in an account which in all other respects was sufficiently descriptive so as to support a petition brought pursuant to the provisions of § 44-5-26.

Indeed such a conclusion can be gathered from the history of the legislation as related by petitioner. The provisions of §§ 44-5-15 and 44-5-16 do not differ materially from the provisions of Public Statutes 1882, chap. 43, secs. 6 and 7. By the provisions of P.S. 1882, chap. 43, sec. 15, however, now § 44-5-30, the taxpayer was denied relief if at the trial it appeared that he "concealed or omitted any property from his account, or has not placed a fair value thereon • • •." A reading of the combined provisions demonstrates that any concealment or omission, however trifling, operated to deprive the taxpayer of a judicial review.

With the enactment of G. L. 1896, chap. 46, sec. 17, the legislature had relaxed the burden of the minuteness pre-

viously required by providing that such concealment or omission must be willful. The general assembly further relaxed such provision by the enactment of P.L. 1932, chap. 1945, substituting "fraudulently" for "wilfully." Such relaxation, however, did not result in relieving a taxpayer who intended to contest whatever assessment might be placed on his ratable property from making a return to the assessors which was so full, true and exact as to be something more than a generic classification amounting to nothing more than a mere generalization of its personalty. *Ewing* v. *Tax Assessors, supra.*

The general assembly has not materially altered P.S. 1882, chap. 43, secs. 6 and 7. Hence, petitioner's suggestion that *Coventry Co.* v. *Assessors of Taxes,* and *Clarke* v. *Tinkham, supra,* are not applicable to the instant case is without merit, since both cases were clearly decided on the sufficiency of the account required by the provisions of those sections.

In the case at bar the trial justice concluded that the account, as it related to petitioner's personal property, was so lacking in sufficiency as to be inadequate and thus defective. An examination of the account, heretofore set out in this opinion, leads us to the conclusion that the trial justice did not err in characterizing petitioner's description of its personal property as "inadequate." The account fails to describe the nature or quantity of the obviously various types of machinery located in separate and distinctive sections of the mill property. It is to be noted that no distinction whatsoever is made between petitioner's machinery and other personal property, except for the reference to "Stock in trade" which clearly does not refer to fixtures. Indeed the reference to "Stock in trade" gives no indication as to what percentage thereof might be goods to be processed, in process or finished. It should be noted that these observations are made not by way of referring to omissions, but rather to the vagueness which, considered

altogether, establish the account as not being true, full and exact, as required by the statute.

In *Stone* v. *Norris,* 40 R. I. 477, not otherwise in point, this court referred to the nature of the account as requiring "the extent, character and particulars of an individual's ownership of personal property * * *."

Whether the remaining classifications of petitioner's personalty are sufficient so as to comply, we need not consider.

The petitioner further contends, however, that if the account is found to be insufficient, nevertheless respondent should not be heard to object for the reason that he furnished the form which did not call for a more detailed description than that which was furnished. The trial justice correctly observed that respondent was under no obligation or duty to supply any taxpayer with a form. Indeed respondent could not waive the requirements of the statute which must be met as a condition precedent to the jurisdiction of the court. It was for petitioner, whether using a form supplied by respondent or one independently fashioned, to bring in an account contemplated by the legislature in its mandate as heretofore interpreted by this court.

The petitioner further contends that the decision of the trial justice constitutes prejudicial error for the reason that the interpretation which she placed on §§ 44-5-15 and 44-5-16 results in a denial of due process and thus is violative of the fourteenth amendment to the United States constitution. In support thereof it cites a number of federal decisions to the effect that due process requires that before a tax shall become irrevocably fixed a taxpayer must be apprised of its right to a hearing which must be real and not merely apparent.

We are in full accord with the principles decided in the cases cited, but on their facts they are clearly distinguishable from the circumstances of the instant case.

Here the legislature has provided that respondent was required to hold hearings at a time or times subsequent to the effective day of assessment; that petitioner should receive notice in advance as to the time and place of such hearings; and that by making a full, true and exact account of its ratable property, describing each parcel of its real and personal property and placing a value thereon, the taxpayer would be entitled to a judicial review of the tax eventually assessed if in the opinion of the taxpayer such assessment was excessive.

Clearly the legislature intended the account, made under oath, to constitute a taxpayer's representation as to the character, extent and particulars of its ratable property at the hearing afforded by the statute. Moreover, the general assembly has provided a taxpayer with more than three and one-half months in which to prepare an account from his or its records. The very purpose of providing for such an account is to afford the taxpayer protection against an overassessment. It is to be noted that by the very terms of the statute a taxpayer is entitled to a judicial review of an assessment which he claims to be illegal, as distinguished from excessive, without the prior requirement of making an account.

We are not persuaded that *Bishop* v. *Tax Assessors*, 47 R. I. 351, as is argued by petitioner, indicates that requiring literal compliance with the provisions of the statute might constitute a denial of due process. There a taxpayer was seriously ill, out of the state and clearly incapable of attending to her business affairs. She died prior to the expiration of the time fixed by the assessors for their meetings, and her executors, when appointed, forthwith attempted to swear before the assessors to an account which, in all other particulars, was proper within the meaning of the statute. The assessors refused to take the oath on the ground that the time therefore had passed, whereupon their authorized attorney swore to the account before a notary

public. The assessors received the account and a hearing was held thereon, resulting in an assessment which this court held to be excessive.

Construing the phrase "whoever neglects or refuses to bring in such an account, if overtaxed, shall have no remedy therefore," this court held that in the circumstances of that case there was not such neglect as the legislature had in mind, since it was not likely that the general assembly intended to require a taxpayer to do that which was impossible to be done.

Nor is there any merit in petitioner's contention that the statute is lacking in specification as to how a taxpayer may comply with its requirements. This court has repeatedly defined the legislative intent as requiring such sufficiency in the separation and description of the various parcels of real and personal property as to be of assistance to the assessor in assessing a tax against each such parcel.

The petitioner concedes, as was held by this court in *Ewing* v. *Tax Assessors, supra,* that "Household furniture in excess of $300.00" was not sufficient so as to comply with the requirements of the statute. It attempts to distinguish the instant case and argues that the account made by it was more meaningful. We fail to perceive how "Stock in trade, 182,500." is more enlightening than the scope of the information reported in the *Ewing* return, or "Machinery propelled by power in factory, machine shop, manufacturing establishment, etc. 537,500." is any more informative than "goods, chattels, wares and merchandise 3384." held by this court to be insufficient in *Clarke* v. *Tinkham, supra.*

Finally, the petitioner argues that since the trial justice found the assessment against it to be excessive by something more than one million dollars, her decision that the petitioner was not entitled to relief constitutes a gross miscarriage of justice. This argument begs the question.

The finding referred to by the petitioner was purely gratuitous since the court was without jurisdiction to make it. It was made, we perceive, as a conscientious effort to give this court the benefit of her findings in the event that the petitioner's account, contrary to her conclusion, so complied with the requirements of the statute as to vest the superior court with jurisdiction.

The petitioner's exception is overruled, and the case is remitted to the superior court for entry of judgment on the decision.

ROBERTS, J., dissenting. I am unable to concur in the majority's conclusion that the trial justice properly dismissed for want of jurisdiction the taxpayer's petition for relief from an assessment pursuant to § 44-5-26. The trial justice found that the account returned by the taxpayer to the respondent assessor was insufficient and inadequate to constitute the true and exact account of all ratable estate owned or possessed by the taxpayer which is required to be filed with the assessor under the provisions of § 44-5-15. Having so found and apparently following the decision of this court in *Ewing* v. *Tax Assessors*, R. I. , 176 A.2d 69, the trial justice concluded that the taxpayer had not filed "an account" as prescribed under the provisions of § 44-5-26 and therefore was not entitled to the benefit of the remedy to review the assessment as provided therein.

The clear purpose of § 44-5-26 is to provide for a review of an assessment of a tax by any person aggrieved on any ground whatever by any assessment of taxes. The procedure for obtaining such review is by petition to the superior court. Section 44-5-26 contains a proviso that "in case such person has not filed *an account*, he shall not have the benefit of the remedy provided in this section * * *." (italics mine) If I concede the correctness of the majority's view that the account filed by the taxpayer in the instant petition is not a true and exact account as contemplated in

§ 44-5-15, I cannot agree that the phrase "an account" contained in § 44-5-26 contemplates giving the taxpayer a review of the assessment only if he has filed the full and exact account provided for in § 44-5-15.

The majority holds that in enacting § 44-5-26 the legislature intended that the account provided for therein as a condition precedent to the taxpayer's right to have a review of an overassessment is the true and exact account required to be returned to the assessor under § 44-5-15. I am of the opinion that to so construe the phrase "an account" in § 44-5-26 is to do violence to the well-settled rule of statutory construction that statutes remedial in purpose should be liberally construed so as to permit an accomplishment of that purpose. It is my view that § 44-5-26 is remedial, it obviously being a statute that was designed to provide a simple and convenient method through which the taxpayer may require a just assessment of the tax imposed upon his property. *Thrift* v. *Thrift*, 30 R. I. 357. I am of the further opinion that this court in *Bishop* v. *Tax Assessors*, 47 R. I. 351, clearly treated this provision as being remedial in character.

The provisions of § 44-5-26 disclose a legislative intent to provide all taxpayers with a method for obtaining a review concerning the validity of the assessments of their property. This review has been made available without regard to whether an account has been filed when the legality of the assessment is challenged or the property in question has been assessed at a value in excess of that at which it had been assessed at the last prior assessment thereof. It is only when the challenged assessment does not exceed the amount of the last prior assessment that the filing of an account is a condition precedent to the taxpayer's right to the review provided for in said § 44-5-26.

I perceive no sound reason for holding that the legislature intended to burden this latter class of taxpayers with the obligation to file the true and exact account prescribed

in § 44-5-15 as a condition precedent to obtaining a review of a challenged assessment while excepting all other taxpayers challenging an assessment from an obligation to file any account at all. Section 44-5-15 has application to all taxpayers and requires the making of a true and exact account as prescribed therein, and failure to so do waives any right to make such an account. In other words, there is a universality of application as to the requirement of § 44-5-15 to make a true and exact account, while the requirement contained in § 44-5-26 concerning the filing of an account is applicable to a limited class of taxpayers. To construe this statute as to impute to the legislature an intention to burden the limited group of taxpayers with the filing of the true and exact account prescribed in § 44-5-15 in order to obtain a review, while exempting from that burden all other taxpayers seeking a review under § 44-5-26, is, in my opinion, irrational. I cannot agree that such an intention should be imputed to the legislature.

In *People ex rel. New York City Omnibus Corp.* v. *Miller*, 282 N. Y. 5, the New York court said at page 9 of that opinion: "The Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality." The majority opinion, when viewed in the light of the remedial purpose of § 44-5-26, makes inescapable the conclusion that the instant taxpayer's right to have its assessment reviewed was defeated by a technicality.

The instant decision requires the instant taxpayer, in order to obtain the review contemplated in § 44-5-26 to file what amounts to an inventory of all of its ratable property as is prescribed in § 44-5-15 and denies it such review on the ground that though it has filed an account, it does not comply literally with the inventory required to be filed in § 44-5-15. It is my opinion that the account filed by the taxpayer in the instant case, conceding that it does not

comply with the requirements of § 44-5-15, is a sufficient account to warrant a review of the challenged assessment within the meaning of that phrase as used in § 44-5-26. It clearly is a sufficient account to put the assessor on notice as to the claim of overassessment against which he must defend.

Because the majority has taken the view that the account filed by the instant taxpayer did not constitute compliance within the requirement of § 44-5-26, any discussion as to the effect of my views of the proper construction of § 44-5-26 on prior decisions of this court would be superfluous.

APPENDIX B

JUDGMENT BELOW

As has been indicated, under the Rhode Island practice no formal judgment is entered in the Supreme Court of that State, there is no formal remittitur, and the final judgment is entered in the Superior Court.

The relevant docket entries in the present case, duly certified, read as follows:

SUPREME COURT

1962 July 5, Papers (11) Transcripts, Exhibits filed.

1963 Jan. 9, Heard on Plaintiff's exceptions.

1963 February 13, Opinion filed. The Petitioner's exception is overruled and the case is remitted to the Superior Court for entry of Judgment on the decision. ROBERTS, J. dissenting.

April 9, Papers, transcripts and exhibits are remitted to the Superior Court, for further proceedings.

C. E. PALMER,
Asst. Clerk.

1963 April 9, Papers received from the Supreme Court.

C. E. CASEY,
Clerk.

1963 April 9, as of February 9, 1962, Judgment entered on decision for Respondent.

1963 April 9, Petitioner files notice of appeal to the Supreme Court of the United States.

The docket entries show that February 9, 1962, was the date on which the trial justice filed her rescript.

APPENDIX C

STATUTES INVOLVED

1. The following provisions of Rhode Island General Laws 1956 are involved in the present case:

44-5-15. Notice of assessors' meeting—Notice by taxpayer of intent to bring in account.—Before assessing any valuations, the assessors shall cause printed notices of the time and place of their meeting to be posted in three (3) public places in the town, for three (3) weeks next preceding the time of such meeting, and shall advertise in some newspaper published in the town, if any there be, at least once a week for the same space of time. Such notices shall require every person and body corporate liable to taxation to bring in to the assessors at such time as they may prescribe a true and exact account of all the ratable estate owned or possessed by him or it, describing and specifying the value of every parcel of such real and personal estate, together with such additional information as may be prescribed by the assessors relative to such ratable estate as may be contained in any corporation or inheritance tax return filed with the state by such person within the year preceding the date of assessment next prior to the bringing in of such account; provided, however, that if any person or body corporate liable to taxation shall file with the assessors, on or before the expiration date prescribed by the assessors as aforesaid, a written notice of his or its intention to bring in an account, such person or body corporate may bring in to the assessors such account at any time between April 1st and April 15th next following the date of assessment. The notice of intention to bring in an account shall be deemed to have been filed with the assessors if the same shall be sent to them by registered or certified mail, postage prepaid, postmarked before twelve o'clock midnight of the last day on which such notice may be filed. Such account shall be deemed to be brought in to the assessors if the same shall be sent to them by registered or

certified mail, postage prepaid, postmarked before twelve o'clock midnight of the last day on which accounts may be brought in pursuant to the provisions hereof; provided, however, in case any such person or body corporate shall fail to file any intention as aforesaid, he or it shall be deemed to have waived his or its rights to file such account.

44-5-16. Oath to account brought in—Remedies after failure to bring in account.—Every person bringing in any such account shall make oath before some notary public or other person authorized to administer oaths in the place where such oath is administered that the account by him exhibited contains, to the best of his knowledge and belief, a true and full account and valuation of all the ratable estate owned or possessed by him; and whoever neglects or refuses to bring in such account, if overtaxed, shall have no remedy therefor, except as provided in §§ 44-4-14, 44-4-15, 44-5-26 to 44-5-31, inclusive, and 44-9-19 to 44-9-24, inclusive. In case a taxpayer shall, because of illness or absence from the state, be unable to make oath to his account as aforesaid within the time prescribed by law, such taxpayer may, in writing, appoint an agent to make oath to such account within the time prescribed by the assessors and said agent shall at the time of making said oath append his written appointment to the account, and for all purposes in connection with said account such taxpayer shall be deemed to have personally made said oath.

44-5-17. Assessment of property covered by account.—If any person shall bring in an account as aforesaid, the assessors shall nevertheless assess such person's ratable estate at what they deem its full and fair cash value.

44-5-20. List of ratable property.—The assessors shall make a list containing the true, full and fair cash value of all the ratable estate in the town, placing land, buildings and other improvements, tangible personal property, and intangible personal property, in separate columns, and dis-

tinguishing those who give in an account from those who do not, and shall apportion the tax accordingly.

44-5-26. Petition in superior court for relief from assessment.—Any person aggrieved on any ground whatsoever by any assessment of taxes against him in any city or town, may within three (3) months after the last day appointed for the payment without penalty of such tax, or the first instalment thereof, if such tax be payable in instalments, file a petition in the superior court for the county in which such city or town lies for relief from such assessment, to which petition the assessors of taxes of said city or town in office at the time such petition is filed shall be made parties respondent, and the clerk shall thereupon issue a citation substantially in the following form:

THE STATE OF
RHODE ISLAND AND PROVIDENCE PLANTATIONS.

To the sheriffs of our several counties, or to their deputies, Greetings:

We command you to summon the assessors of taxes of the town of : to wit, of (if to be found in your precinct) to answer the complaint of of on the return day hereof (said return day being the day of A.D. 19) in the superior court to be holden at the county courthouse in as by petition filed in court is fully set forth; and to show cause why said petition should not be granted.

Hereof fail not, and make true return of this writ with your doings thereon.

Witness, the seal of our superior court, at this day of in the year

, Clerk.

Provided, however, that in case such person has not filed an account, he shall not have the benefit of the remedy provided in this section and in §§ 44-5-27 to 44-5-31, inclu-

sive, unless (1) his real estate has been assessed at a value in excess of the value at which it was assessed on the last preceding assessment day, whether then owned by him or not, and has been assessed at a value in excess of its full and fair cash value; or (2) the tax assessed is illegal in whole or in part; and his remedy shall be limited to a review of the assessment on such real estate or to relief with respect to such illegal tax, as the case may be.

44-5-27. Exclusiveness of remedy by petition.—The remedy provided in §44-5-26 shall be exclusive if the taxpayer owned or possessed any ratable estate at all, except that in a proper case the taxpayer may invoke the equity jurisdiction of the superior court provided the bill in equity is filed within three (3) months after the last day appointed for the payment without penalty of such tax, or the first instalment thereof, if such tax be payable in instalments. A taxpayer alleging an illegal or void tax assessment against him shall be confined to the remedies provided by §44-5-26.

44-5-30. Judgment on petition where taxpayer has filed account.—If the taxpayer has given in an account, and if on the trial of said petition, either with or without a jury, it shall appear that the taxpayer's real estate, tangible personal property or intangible personal property has been assessed at a value in excess of its full and fair cash value, even though it may be found that such full and fair cash value is in excess of the value placed on such property by the taxpayer in his account, or if it shall appear that the tax assessed is illegal in whole or in part, the court shall give judgment that the sum by which the taxpayer has been so overtaxed, or illegally taxed, with his costs, be deducted from his tax; but if the taxpayer's tax be paid, whether before or after the filing of said petition, then the court shall give judgment for the petitioner for the sum by which he has been so overtaxed, or illegally taxed, plus the amount of any penalty paid thereon, with interest from the date on which said tax and penalty were paid and costs,

which judgment shall be paid to the petitioner by the town treasurer out of the treasury. If, however, on the trial of said petition it shall appear that the taxpayer has fraudulently concealed or omitted any property from his account, or if it shall appear that the assessors have not assessed either the taxpayer's real estate or his tangible personal property or his intangible personal property at a value in excess of its full and fair cash value, and that the taxpayer has not been illegally taxed, the assessors shall have judgment and execution for their costs.

2. The following portion of chapter 31 of Rhode Island General Laws 1938 is relevant in view of the argument.

§6. Before assessing any tax, the assessors shall post up printed notices of the time and place of their meeting, in 3 public places in the town, for 3 weeks next preceding the time of such meeting, and advertise in some newspaper published in the town, if any there be, at least once a week for the same space of time. Such notices shall require every person and body-corporate liable to taxation to bring in to the assessors at such time as they may prescribe a true and exact account of all the ratable estate owned or possessed by him or it, describing and specifying the value of every parcel of such real and personal estate, together with such additional information as may be prescribed by the assessors relative to such ratable estate as may be contained in any corporation or inheritance tax return filed within the state of Rhode Island by such person within the year preceding the fifteenth day of June next prior to the bringing in of such account. Such notices shall be in substantially the following form:

Whereas, The electors of the town of
qualified to vote on any proposition to impose a tax, in town meeting legally assembled, on the day of A.D. 19 (or, if a city the city council of the city of by joint resolution approved on this day of A.D. 19), have ordered a tax on the ratable real

estate and tangible personal property and ratable intangible personal property of said town (the tax on ratable intangible personal property to be at the rate of 40 cents on each $100.00 of the value thereof) in a sum not less than dollars and no more than dollars, to be assessed and apportioned on the inhabitants and ratable property of the town as of the day of June, A.D. 19 , at 12 o'clock noon.

Now, therefore, notice is hereby given that in accordance with said resolution and in conformity with the law in relation to the assessment of taxes, every person, co-partnership and corporation liable to taxation is required to bring in to the assessors an true and exact account of all the ratable estate owned or possessed by him or it, describing and specifying the value of every parcel of the real and personal estate so owned or possessed.

All persons who are required to return accounts to the assessors in order to be entitled to exemptions from taxation wholly or in part under the law, are required to render annually to the assessors said account in order to be entitled to the exemption prescribed by law.

Such accounts must be filed with the board of assessors at their office in the town hall (or wherever located) in said town, after the day of June, A.D. 19 , at 12 o'clock noon, up to the day of A.D. 19 , at o'clock M. For the purpose of receiving such accounts, the board of assessors will be in session at their said office daily from the day of A.D. 19 , to the day of A.D. 19 , inclusive, Sundays excepted (this time must follow the date for assessment) from o'clock A.M. until o'clock P.M.

(Here quote general laws of Rhode Island chapter 31, §7.)

All ratable real and personal estate will be taxed to the persons, co-partnerships or bodies corporate who own or

hold the same (or who owned or held the same) at 12 o'clock noon, on said day of June, A.D. 19 .

Executors, administrators, guardians and trustees are hereby notified that all the foregoing applies to them and to trust estates as well as to other persons and property.

Dated

.....
.....
.....
Assessors of Taxes

APPENDIX D

OPINION IN EWING CASE

Supreme Court

Ex.&c. No. 10,299.

ANNE ASHTON EWING

v.

TAX ASSESSORS OF THE TOWN OF JAMESTOWN

OPINION

PAOLINO, J. This is a petition for relief from alleged overvaluation of the petitioner's real estate by the assessors of taxes of the town of Jamestown for the tax assessed on December 31, 1958. It was brought under the provisions of G.L. 1956, § 44-5-26, and is based on the petitioner's allegation that she has duly filed an account of her ratable estate with the assessors in compliance with the requirements of § 44-5-15. The case was heard before a justice of the superior court sitting with a jury and resulted in a verdict favorable to the petitioner.

The case is before this court on respondents' exceptions to the denial of their motion to dismiss the petition on jurisdictional grounds, to certain evidentiary rulings, to the denial of their motion for a new trial and to certain rulings relating to the charge to the jury.

Under exception 1 respondents contend that the trial justice erred in admitting in evidence the account filed by petitioner and under exception 2 they contend that his denial of their motion to dismiss the petition was also error. They base both exceptions on the ground that the account filed does not comply with the jurisdictional requirements of §§ 44-5-15, 16 and 26, and that therefore the superior court had no jurisdiction to grant relief under the remedy granted in § 44-5-26.

Before discussing the evidence which relates to the issues raised by respondents under these exceptions, it may be helpful to point out that petitioner is attacking only the assessment on her real estate. She is not disputing the assessment on her tangible personal property. On April 3, 1959 she filed with the assessors an account which contained the following statement:

> "The following is a true and complete account and statement of all the property and estate, both real and personal, belonging to Anne A. Ewing on December 31, 1958, and subject to local taxation in the Town of Jamestown, Rhode Island * * *."

Under the heading of real estate she described the several parcels owned by her and specified the value of each as well as the value of the buildings and improvements on two of the parcels. The respondents do not question the adequacy of her statement relating to the real estate, but they do question the legality of the statements in the account relating to her tangible and intangible personal property. With respect to the tangible personable property in Jamestown owned by her, the account contains only the following general statement:

"Household furniture in excess of $300.00	"Value $5,775."

And with respect to intangible personal property, the account contains merely the statement "Not taxable."

The fundamental question raised by respondents is whether the account filed by petitioner complies with the pertinent statutory requirements. Section 44-5-15 requires the assessors to give certain notices and further provides that: "Such notices shall require every person * * * liable to taxation to bring in to the assessors * * * a true and exact account of all the ratable estate owned or possessed by him * * * describing and specifying the value of every parcel of such real and personal estate * * *."

With respect to the tangible personal property, the narrow issue before us is whether the statement in the account relating to the household furniture is "a true and exact account * * * describing and specifying the value of every parcel of such * * * personal estate" within the meaning of § 44-5-15. The purpose of requiring a true and exact account describing and specifying the value of every parcel of a taxpayer's ratable estate is to aid the assessors in performing their duty to make a proper assessment. *Coventry Co.* v. *Assessors of Taxes*, 16 R. I. 240, 242. In *Clarke* v. *Tinkham*, 20 R.I. 790, the court held that the statement "goods, chattels, wares, and merchandise, 3384 dollars" was not a compliance with the statute because it did not set forth the separate parcels of which the goods, chattels, wares and merchandise were composed.

In our opinion, the decision in *Clarke* v. *Tinkham*, *supra*, applies to the facts of the instant case. Section 44-5-15 requires reasonable compliance with all of its provisions. The general statement of petitioner with respect to her household furniture, without any further description and valuation, is not, in our opinion, a reasonable compliance. Such generality is no aid to the assessors in making a proper return.

The question remains whether such noncompliance deprives petitioner of the remedy provided by § 44-5-26. It is pertinent to point out here that at the hearing in the superior court, petitioner conceded that the instant petition was based on the account which she filed with the assessors. The account required under § 44-5-15 means one which reasonably complies with the provisions of said section. Section 44-5-16 requires every person filing such account to make oath that the account filed contains, to the best of his knowledge and belief, a true and full account and valuation of all the ratable estate owned or possessed by him. This section further provides that "whoever neglects or refuses to bring in such account, if overtaxed, shall have no remedy therefor * * *."

As we have already stated, the instant petition was based on the account in question and was brought under the provisions of § 44-5-26 permitting petitioner to bring such petition and authorizing the superior court to hear the same. But that section also provides as follows: "Provided, however, that in case such person has not filed an account, he shall not have the benefit of the remedy provided in this section * * *."

The remedy, which is purely statutory, is granted only to those taxpayers who file an account which reasonably complies with the requirements of § 44-5-15 and 16. In the absence of such compliance the taxpayer is not entitled to the remedy and the superior court is without jurisdiction to grant relief. Furthermore, lack of such compliance affects jurisdiction of the subject matter of the petition and therefore can be raised at any stage of the proceeding. Consequently respondents' motion to dismiss was proper, even if we assume that their plea did not expressly challenge the adequacy of the account. For these reasons, it is our opinion that the rulings of the trial justice admitting the account in evidence and denying the motion to dismiss the petition constituted reversible error.

Our holding with respect to the item of the household furniture is decisive of the instant petition and it is not therefore necessary to consider respondents' remaining contentions. However, it might be helpful to point out that there is merit in their contention that the mere statement "Not taxable" with reference to the item of intangible personal property is not a compliance with the statute.

The statute requires an account of all of a taxpayer's *ratable* property, whether it is taxable or not. See *Coventry Co.* v. *Assessors of Taxes, supra,* where the court said at page 241:

> "In the *Queen* v. *Overseers of Malden,* 10 B. & S. 323, it was said that ratable property means property in its quality and nature capable of being rated; that is,

> appraised or assessed. We think the word *ratable* is used in the statute with the same meaning that is given to it by this judicial definition. In this sense, it does not relate to property actually taxed, but to that which is in its nature taxable, and which the assessors rate or value in discharging their duty."

It may very well be that petitioner's ratable intangible personal property is not taxable in the town of Jamestown, but that determination is for the assessors to make on the basis of information furnished by the taxpayer in the account.

We have carefully read *New York, N.H. & H.R.R.* v. *Smith*, 20 R.I. 134, cited by the petitioner. It is clearly distinguishable on its facts from the instant case and does not therefore help her. Nor is there any legal significance to the fact that the assessment of her tangible personal property was not in dispute. The statute requires a true and exact account and valuation of *all* of a taxpayer's ratable estate and does not, directly or otherwise, relieve him from the duty of reasonably complying with such requirements.

The respondents' exceptions Nos. 1 and 2 are sustained. On December 13, 1961, the petitioner may appear before this court to show cause if any she has, why the case should not be remitted to the superior court for entry of judgment for the respondents.